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IN THE

Supreme Court of The United States

October Term, 1982

DENNIS LYNCH, Individually And As Mayor Of The City Of Pawtucket,

RICHARD A. MUMFORD, Individually And As Finance Director For The City Of Pawtucket, And

GUY DUFAULT, Individually And As Director Of Department Of Parks And Recreation Of The City of Pawtucket, And

THE CITY OF PAWTUCKET,

Petitioners,

v.

DANIEL DONNELLY, GEORGE KRIEBEL, ROBERT GOODWIN, GREG FRAZIER And AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICI CURIAE* OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	PAGE
Question Presented	ii
Consent of the Parties	iii
Table of Authorities	iv
Constitutional Provisions	vi
Interest of the *Amici Curiae*	1
Statement of the Case	2
Introduction	4
Argument	
I—The Pawtucket Nativity Scene is a Fundamental Christian Religious Symbol	6
II—City Sponsorship, Ownership and Maintenance of the Pawtucket Nativity Scene is Unconstitutional Under the Establishment Standard of the First Amendment: The City is by its Actions Advancing Religion, Preferring One Religion Over Others and Violating the Religious Neutrality Required of Government by the Establishment Clause	13
1. The Nativity Scene Does Not Reflect a Clearly Secular Purpose	15
2. The Primary Effect of the Pawtucket Nativity Scene is to Advance Religion	19
3. The Pawtucket Nativity Scene Excessively Entangles the State With Religion	22
Conclusion	25

QUESTION PRESENTED

May a city own, erect and maintain, as part of a Christmas display, a nativity scene depicting the birth of the Christian Messiah, Jesus?

CONSENT OF THE PARTIES

Petitioners and Respondents have consented to the filing of this brief, and their letters of consent will be filed with the Clerk of the Court.

TABLE OF AUTHORITIES

Cases	Page
Ahlburn v. *Cianci*, No. 82-801 (D.R.I. filed Dec. 17, 1982)	5, 23
Allen v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973)	5, 11, 23
ACLU v. *Rabun County*, 698 F.2d 1098 (11th Cir. 1983)	12
Baer v. *Kolmorgen*, 14 Misc. 2d 1015, 181 N.Y.S.2d 230 (Sup. Ct. 1958)	5, 23
Braunfeld v. *Brown*, 366 U.S. 599 (1961)	12
Citizens Concerned for Separation of Church and State v. *Denver*, 508 F. Supp. 823 (D. Colo. 1981)	5, 23
Citizens Concerned for Separation of Church and State v. *Denver*, 481 F. Supp. 522 (D. Colo. 1979), *appeal dismissed*, 628 F. 2d 1289 (10th Cir. 1980), *appeal docketed*, No. 82-1022 (10th Cir. 1982)	5, 23
Committee for Public Education and Religious Liberty v. *Nyquist*, 413 U.S. 756 (1973)	15, 19, 22
Conrad v. *Denver*, ___ Colo. ___, 656 P.2d 662 (Sup. Ct. Colo. 1983) (*en banc*)	5, 23
Engel v. *Vitale*, 370 U.S. 421 (1962)	21, 24
Everson v. *Board of Education*, 330 U.S. 1 (1947)	22
Fox v. *City of Los Angeles*, 22 Cal. 3d 792, 587 P.2d 663 (1978)	21
Larkin v. *Grendel's Den*, ___ U.S. ___, 51 U.S.L.W. 4025 (Dec. 13, 1982)	19
Larson v. *Valente*, 456 U.S. 228 (1982)	3, 13, 14
Lawrence v. *Buchmueller*, 40 Misc. 2d 300, 243 N.Y.S.2d 87 (Sup. Ct. 1963)	5, 23
Lemon v. *Kurtzman*, 403 U.S. 602 (1971)	2, 3, 11, 13, 14, 15, 22
Marsh v. *Chambers*, ___ U.S. ___, 51 U.S.L.W. 5162 (July 5, 1983)	2, 21
McCollum v. *Board of Education*, 333 U.S. 203 (1948)	17, 18
McCreary v. *Stone*, No. 83-0987 (S.D.N.Y. filed Feb. 7, 1983)	5, 23
McGowan v. *Maryland*, 366 U.S. 420 (1961)	12, 13, 17
Mueller v. *Allen*, ___ U.S. ___, 51 U.S.L.W. 5050 (June 29, 1983)	22

CONSTITUTIONAL PROVISIONS INVOLVED

1. First Amendment to the Constitution of the United States.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. Fourteenth Amendment to the Constitution of the United States.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cases	Page
Russell v. *Town of Mamaroneck*, 440 F. Supp. 607 (S.D.N.Y. 1977)	5, 23
School District of Abington Township, Pennsylvania v. *Schempp*, 374 U.S. 203 (1963)	2, 19, 21
Stone v. *Graham*, 449 U.S. 39 (1980)	11, 15, 16
Tilton v. *Richardson*, 403 U.S. 672 (1971)	19
Walz v. *Tax Commission*, 397 U.S. 664 (1970)	22
Widmar v. *Vincent*, 454 U.S. 263 (1983)	21
Zorach v. *Clauson*, 343 U.S. 306 (1952)	17, 18, 21

CONSTITUTIONAL AND STATUTORY AUTHORITY

U.S. Constitution, Amendment I	*passim*
U.S. Constitution, Amendment XIV	14
5 U.S.C. §6103	18

OTHER AUTHORITIES

L.W. Cowie & J.S. Gummer, *The Christian Calendar* (1974)	8, 9
G. Ferguson, *Signs and Symbols in Christian Art* (1954)	9
C.Y. Glock & R. Stark, *Christian Beliefs and Anti-Semitism* (1966)	6
J. Isaac, *The Teaching of Contempt: Christian Roots of Anti-Semitism* (1962)	9, 10
L. Pfeffer, *God, Caesar and the Constitution* (1975)	12
R. Ruether, *Faith and Fratricide—The Theological Roots of Anti-Semitism* (1974)	9, 10
G.G. Sill, *A Handbook of Symbols in Christian Art* (1975)	9
F.E. Talmage, *Readings in the Jewish-Christian Encounter* (1975)	9, 10
J.E. Wood, Jr., *Jewish-Christian Relations in Today's World* (1971)	10

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Amici support the position of respondents and respectfully submit that the judgment of the United States Court of Appeals for the First Circuit in the above-captioned case should be affirmed.

INTEREST OF THE AMICI CURIAE

The Anti-Defamation League of B'nai B'rith (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the

general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, the Anti-Defamation League has previously filed *amicus* briefs before this Court in such cases as *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) and *School District of Abington Township, Pennsylvania* v. *Schempp*, 374 U.S. 203 (1963). The League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

The American Jewish Congress, which was founded in 1918, is a membership organization of American Jews dedicated to the protection of the civil liberties of all Jews and of all Americans and in this regard is committed to the separation of church and state. Among their many activities directed to these ends, the American Jewish Congress has in the past filed *amicus curiae* briefs in this Court, *e.g.*, *Marsh* v. *Chambers*, ___ U.S. ___, 51 U.S.L.W. 5162 (July 5, 1983).

At issue in this case is the constitutionality under the establishment clause of the first amendment, of Pawtucket, Rhode Island's sponsorship of a nativity scene depicting the birth of the Christian Messiah, Jesus.

Amici submit the accompanying brief because they believe the instant case raises serious questions concerning government support and preference of one religion — Christianity — in contravention of the establishment clause of the first amendment.

STATEMENT OF THE CASE

For forty years, the city of Pawtucket has owned and annually erected as part of its annual Christmas display, a near life size nativity scene depicting the birth of the Christian Messiah, Jesus, according to the New Testament (Joint Appendix hereinafter "J.A.") (J.A. 33, 105).

Plaintiffs, residents and taxpayers of Pawtucket, Rhode Island, and the Rhode Island affiliate of the American Civil Liberties Union (ACLU) challenged the forty-year practice by the city of

Pawtucket of owning and annually displaying a nativity scene of the biblical birth of the Christian Messiah charging that this practice constituted an establishment of religion in contravention of the establishment clause of the first amendment.

The District Court for Rhode Island held for plaintiffs and found that Pawtucket's inclusion of a nativity scene in its Christmas display violated the establishment clause. *Donnelly* v. *Lynch*, 525 F. Supp. 1150 (D.R.I. 1981).

The court ruled after a three-day trial, which included expert witnesses on the religious symbolism and significance of nativity scenes and also a personal view of the nativity scene by the court. The court found that the nativity scene was clearly a religious symbol and that the city's sponsorship of this symbol unconstitutionally violated the tripartite test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), because the nativity scene has a clearly religious purpose, a primary effect of advancing religion and also runs afoul of the "entanglement" test. 525 F. Supp. 1150, 1181.

The Court of Appeals for the First Circuit affirmed. *Donnelly* v. *Lynch*, 691 F.2d 1029 (1st Cir. 1982). While the First Circuit held that the proper yardstick of the government's conduct is not the tripartite test of Lemon v. Kurtzman, applied by the district court, but rather the "strict scrutiny" test applicable when government discriminates among religions, *Larson* v. *Valente*, 456 U.S. 228 (1982) (striking state tax exemptions which distinguished between religious organizations according to size), the court of appeals held that under either test, the governmental ownership and sponsorship of a nativity scene depicting the biblical birth of the Christian Messiah cannot pass constitutional muster.

This Court granted *certiorari* on the first amendment issues raised.

The nativity scene, challenged by plaintiffs, is set up in approximately 140 square feet (J.A. 45) of the lower center of a privately owned area known as Hodgson Park (J.A. 35, 59) which is located close to the Pawtucket City Hall (J.A. 14).

The nativity scene display is set up, maintained and dismantled by city employees, or city-paid contractors (J.A. 30, 32, 35) under the supervision of the city's Director of Parks and Recreation (J.A. 29). All lights, figures and buildings that make up the display are owned by the city (J.A. 33), and the city reimburses the private owner of the park for all the electricity used (J.A. 34, 38).

The city-owned nativity scene (J.A. 33) encompasses a space of 14 feet by 10 feet, and depicts the birth of Jesus in life size figures (J.A. 13, 51). There are approximately twelve statues ranging from 12 inches to five feet high (J.A. 51). These figures include the baby Jesus which is 12 inches long lying inside straw in a manger which is about five feet high (J.A. 13). The baby is surrounded by statues which include Mother Mary and Saint Joseph, in a kneeling position. Other characters depicted in the city's nativity scene are the three kings, three shepherds in a kneeling position, various animals and two angels (J.A. 52).

INTRODUCTION

At issue is the constitutionality of the city of Pawtucket's sponsorship of a nativity scene depicting the birth of the Christian Messiah, Jesus, according to the Christian biblical tradition.

The issue is a narrow one. Not at issue is the right of a private group to display a nativity scene in a private park. Also not at issue is the right of a private group to display a nativity scene in a public park. Further, the nativity scene is the only portion of the Pawtucket Christmas display challenged. No other symbols of Christmas in the Pawtucket display, *i.e.*, the lights, trees, reindeer, Santas, wishing wells, carolers, or stars are at issue (J.A. 4, 43, 44). While the issue is narrow, this case poses a serious constitutional problem.

Jews in the United States are members of a minority religious group. Like other minority religious groups that were persecuted on religious grounds abroad, Jews came to the U.S. to escape religious discrimination that flourished in countries where governments endorsed a majority or state religion. To avoid such

treatment here, the Founding Fathers inserted in the Bill of Rights the first amendment limitation on the government's power to make any laws respecting an establishment of religion. It is this establishment clause of the first amendment which has afforded minority religious groups, in the United States, the opportunity to live in religious freedom, free of threats from a religious majority which might seek to impose its religious views or practices on minorities through government action or sponsorship. Today it is this principle which is threatened.

Cases nationwide challenging the city or state government display of nativity scenes reflect the concern of many Americans with state support or advancement of a particular religion.[1]

May a city own, maintain, and display a nativity scene depicting the birth of the Christian Messiah, Jesus? *Amici* submit that it may not do so within the purview of the first amendment to the Constitution. For the city sponsorship of a nativity scene raises the very danger which the establishment clause was designed to prevent. This occurs because the government sponsorship of a nativity scene depicting the miraculous birth of the Christian Messiah constitutes a twofold establishment. First, it is an establishment of religion because the nativity scene is very clearly a religious symbol, the display of which has the purpose and effect of advancing religion. *Amici* argue this effect is most pronounced among the children of minority religions. Second, because the nativity scene depicts the birth of the Christian Messiah, its display by a government instrumentality is the display of a Christian religious symbol, in recognition, celebration and commemoration

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1. To date these include: *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973); *McCreary* v. *Stone*, No. 83-0987 (S.D.N.Y. filed Feb. 7, 1983); *Ahlburn* v. *Cianci*, No. 82-801 (D.R.I. filed Dec. 17, 1982); *Citizens Concerned for Separation of Church and State* v. *Denver*, 508 F. Supp. 823 (D. Colo. 1981); *Citizens Concerned for Separation of Church and State* v. *Denver*, 481 F. Supp. 522 (D. Colo. 1979), *appeal dismissed*, 628 F.2d 1289 (10th Cir. 1980), *appeal docketed*, No. 82-1022 (10th Cir. 1982); *Russell* v. *Town of Mamaroneck*, 440 F. Supp. 607 (S.D.N.Y. 1977); *Conrad* v. *Denver*, ___ Colo. ___, *656 P.2d 662 (Sup. Ct. Colo. 1983) (en banc)*; Lawrence v. Buchmueller, 40 Misc. 2d 300, 243 N.Y.S.2d 87 (Sup. Ct. 1963); *Baer* v. *Kolmorgen*, 14 Misc. 2d 1015, 181 N.Y.S.2d 230 (Sup. Ct. 1958).

of a religious event. This government action prefers the belief of one religion over another, thus, creating an establishment of a particular religion — the Christian religion.

By this brief, *amici* seek to explain the nature of Pawtucket's nativity scene and to show why this scene is the religious symbol, beyond all symbols, whose sponsorship by the Pawtucket city government sends a clear message of isolation to Jewish citizens. This occurs because the Pawtucket nativity scene is a symbol of the divinity of the birth of Jesus, the Christian Messiah, which throughout the ages has highlighted the historic difference between Jews and Christians — failure by Jews to accept Jesus as the Messiah. Recounting the birth of the Christian Messiah, the nativity scene evokes the question that has "haunted Jewish-Christian relations for nearly two milennia. . . . What were their [the Jews] motives for rejecting the messianic claims made about Jesus." C.Y. Glock & R. Stark, *Christian Beliefs and Anti-Semitism* 50 (1966). Because the nativity scene is the symbol of this gulf between Christians and Jews, Pawtucket's sponsorship of the nativity scene, *amici* argue, has caused and will only serve to further cause divisiveness in the community. This divisiveness, should the nativity scene continue to be city-sponsored, will lead to increasing government entanglement in religion as competing religious groups will seek to have government endorsement of their religious symbols. To avoid this spectre, *amici* here submit that this Court should affirm the decisions below disallowing a city-sponsored nativity scene in Pawtucket.

ARGUMENT

I.

The Pawtucket Nativity Scene is a Fundamental Christian Religious Symbol

The religious symbolism and significance of the Pawtucket nativity scene is beyond serious dispute. It is demonstrated by the district court findings in this case, the history of the nativity scene, community perceptions and case law. The district court held,

525 F. Supp. at 1166, that the nativity scene, which depicts the birth of Jesus, is a religious symbol because it does not depict the birth as a mere historical fact, but rather combines history and faith — faith that Jesus' birth was miraculous, and that Jesus is the Son of God and that he was the Messiah sent to earth to save mankind. This faith is not shared by non-Christians. Through poses and facial expressions of the statues showing "a sense of awe and worship," the district court found that the figures of the nativity scene show that the baby in the manger is not a mere baby, but rather, divine. 525 F. Supp. at 1166.

> In sum, the court does not understand what meaning the creche, as a symbol, can have other than a religious meaning.
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> * * * *
>
> [U]nlike stars, or bells, or trees, the creche is not a common, ordinary subject that attains a religious dimension only if the viewer understands that it is intended to connote something more than its facial significance, and possesses the key to unlock that secondary meaning. The creche is more immediately connected to the religious import of Christmas because it is a direct representation of the full Biblical account of the birth of Christ.

525 F. Supp. at 1167.

Not only did the district court find that the nativity scene is a religious symbol, the court clearly stated that the symbol is a Christian one. "It is the embodiment of the Christian view of the birth and nature of Christ." 525 F. Supp. at 1167. In its affirmation of the district court's holding the nativity scene unconstitutional, the court of appeals specifically found that the district court's assessment that the nativity scene is a religious symbol was correct. 691 F.2d 1029, 1031-33. Use of this religious symbol, the court of appeals found "is an act which discriminates between Christian and non-Christian religions." 691 F.2d 1029, 1034.

The district court's finding that the nativity scene is a religious symbol should be affirmed by this Court because it is based on the district court's three-day trial, including a personal court view of

the Pawtucket nativity scene and numerous witnesses' testimony as to the symbolism, purpose and effect of the nativity scene on them and upon members of the community, especially children. Plaintiff Donnelly testified that he viewed the nativity scene "as a religious display depicting the birth of Christ" (J.A. 13). Further, plaintiff Donnelly distinguished the nativity scene from other Christmas decorations. His testimony contrasted the nativity scene with Santa Claus and the Christmas tree which he stated were not religious symbols because unlike the nativity scene, they did not depict a specific religious event (J.A. 18). In addition, the Executive Director of the ACLU testified as to the religious symbolism of the nativity scene (J.A. 19). An expert witness on the effect of symbols on children, Dr. M. Werle, supported these conclusions. He testified that "the nativity scene is a very powerful religious symbol because it is a symbol of worship" (J.A. 75). This symbol stood out in contrast to other Christmas decorations. "Unlike the secularized dimensions of the Christmas celebration[:] the trees, Christmas trees, lights, reindeer, Santa Claus, the nativity scene is clearly a symbol of the worship of Jesus" (J.A. 75).

The district court's holding that the nativity scene is a religious symbol is hardly surprising. It finds ample support in the history of the nativity scene, the perceptions of the community and case law.

While there are many symbols or decorations of Christmas which reflect the secular cultural elements of that holiday, *e.g.*, lights and trees,[2] the nativity scene is a specifically religious Christian symbol, which was introduced by Saint Francis of Assisi in 1224, and incorporated into the Christmas celebration to

2. Christmas is considered by historians to be a combination of celebrations: the date Jesus was born and a number of pagan holidays which fell about the same period in the calendar. These pagan holidays include a Roman feast day on the 25th of December called the Feast of the Birth of the Unconquered Sun, another Roman pagan festival in mid-December in honor of Saturn, the God of seed-corn, and a Norse festival in honor of the sun. The Christmas tree, Christmas light, and mistletoe symbols derive from this pagan element of the Christmas holiday. L.W. Cowie & J.S. Gummer, *The Christian Calendar* 21-22 (1974).

recall and to explain the birth of Jesus. L.W. Cowie & J.S. Gummer, *The Christian Calendar* 22 (1974). The story depicted by the scene is the birth of Jesus as set forth in the Gospels. Specifically the nativity scene describes that portion of the life of Jesus recounted in the Gospel known as the Incarnation — how God became man — including the infancy and childhood of Jesus. G.G. Sill, *A Handbook of Symbols in Christian Art* 68 (1975).

In Christian symbolism, the object of the nativity scene is to depict not the birth of a historical figure, Jesus, but rather the birth of the Messiah. The fact that this birth is a special religious event is shown through the figures representing the Holy Family. "The Christ Child is lying in a manger or upon the straw. The Virgin kneels in adoration before him. Joseph in his wonderment, stands at one side." G. Ferguson, *Signs and Symbols in Christian Art* 45 (1954).

This religiously based depiction of the birth of the Christian Messiah is one of the most fundamental religious symbols to Christians and Jews. For Christians it provides basic religious definition — Christians accept the birth of Jesus as the birth of the Messiah. "The Christian faith. . . is based on the mystery of the Incarnation. . . . The Christian Incarnation means that God was incarnate in the human person of. . . Jesus of Nazareth. . . ."J. Isaac, *The Teaching of Contempt:Christian Roots of Anti-Semitism* 118 (1962). "The most fundamental affirmation of Christian faith is the belief that Jesus is the Christ. . . . On this affirmation everything else in Christian theology is built. To ask about this affirmation is to ask about the keystone of Christian faith." R. Ruether, *Faith and Fratricide - The Theological Roots of Anti-Semitism* 246 (1974).

Just as fundamental to Jewish thought is the "non-incarnation of God." F.E. Talmage, *Readings in the Jewish-Christian Encounter* 281 (1975), citing Martin Buber. "The God in whom [Jews] believe, to whom [Jews] are pledged, does not unite with human substance on earth." *Id.* at 282. Further, Jews believe in the inseparability of the coming of the Messiah with the coming

of the Messianic Age and, thus, cannot accept the Christian conception of Jesus as the Messiah. R. Reuther, *Faith and Fratricide-The Theological Roots of Anti-Semitism* 246-247 (1974).

Emerging from these fundamentally disparate Christian and Jewish beliefs is a basic difference between these two religions concerning the messianic nature of Jesus. It has been described by theologians as part of the "ultimate division between Judaism and Christianity." F.E. Talmage, *Readings in the Jewish-Christian Encounter* 281 (1975), *citing* Martin Buber. This would have remained merely a theological difference if it were not for the reaction, throughout history, to the Jewish non-acceptance of the Christian belief in the Messiah. Discreditation of Jewish beliefs by linking the non-acceptance of Jesus as the Messiah to the punishment of the wandering of Jews, together with forced conversion of Jews, were the historic responses to the Judaic non-acceptance of Jesus as the Messiah. *See Christian Roots of Anti-Semitism, supra,* at 114-115; J.E. Wood, Jr., *Jewish-Christian Relations in Today's World* 98 (1971).

For Jews, government sponsorship of the nativity symbol stands for state endorsement of the most fundamental tenet of Christianity — acceptance of Jesus as the Messiah. This state sponsorship of the most fundamental belief of the Christian religion sends a clear message of rejection to Jewish citizenry, other non-Christian religious groups, and non-believers who do not share the religious beliefs of the majority.

There is nothing more fundamental in the first amendment than the prohibition against the government sponsorship of any religion. The government may not tell us whom or how or where to worship nor may the government participate in the sponsorship or advancement of any religious belief. In matters of religion, the government must be neutral. It is this neutrality which is violated by Pawtucket's sponsorship of the nativity scene.

The religiosity of the nativity scene inheres in its history. It is clear to the Christian and Jewish communities just as it was clear to the district court. Further, the district court's finding is in

accordance with the first amendment standard concerning religious symbols. In *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973), the court of appeals held that the creche is "obviously a religious symbol." 495 F.2d at 69.

In a case involving a similar religious display, *Stone* v. *Graham*, 449 U.S. 39 (1980) (per curiam), this Court held that posting the Ten Commandments, privately purchased, on the walls of public school classrooms violated the first amendment. Central to the Court's determination of unconstitutional religious purpose under the first prong of the *Lemon* v. *Kurtzman* tripartite test, 403 U.S. 602, 612-613 (1971), was the religious nature of the Commandments themselves.

Notwithstanding the presence of a disclaimer on the posted Commandments stating that they had a "secular application" as the "fundamental legal code of Western Civilization and the Common Law of the United States," 449 U.S. 39, 41 (1980), the Court held that:

> [T]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths. . . . The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. *See* Exodus 20:12-17; Deuteronomy 5:16-21. Rather, the first part of the Commandments concerns the religious duties of believers. . . .

449 U.S. 39, 41-42.

Insofar as the nativity scene is undeniably sacred in content for the Christian faith, and its subject matter is concededly not even "arguably secular," it meets the standard for religious symbolism set forth in *Stone* v. *Graham*. Unlike the Ten Commandments which at least have some secular application insofar as they are in fact incorporated, to a significant degree, in legal codes, the nativity scene depicts the birth of the Christian Messiah in a way that is, in the language of the district court "the embodiment of the

Christian view of the birth and nature of Christ." 525 F. Supp. at 1167. The nativity scene is primarily, if not entirely, religious in nature and its display clearly serves a religious purpose.

Further, unlike the Ten Commandments which emanate from both the Christian and Jewish religions, the nativity scene depicts the birth of Jesus according to the Christian view — set forth in the Gospels of the New Testament, thus, the nativity scene is not only a religious symbol but a Christian symbol.

Similar to the nativity scene is the cross, the universal symbol of the Christian religion. *See* L. Pfeffer, *God, Caesar and the Constitution* 341 (1975). In *ACLU* v. *Rabun County*, 698 F.2d 1098 (11th Cir. 1983), in considering the constitutionality of a lit up cross set up in a Georgia park, the Court of Appeals for the Eleventh Circuit held "[s]ubstantial evidence supports the district court's finding that the latin cross is a universally recognized symbol of Christianity." 698 F.2d 1098, 1103. The court further found that the Georgia state government had the burden under the establishment clause to articulate a secular purpose to justify erecting the cross, because in allowing a lit cross in the state park it had permitted "religious symbols to be constructed on public property." 698 F.2d at 1110.

Despite the coincidence of district court findings, appellate affirmation, history, community beliefs and case law concerning the religiosity of the nativity scene, petitioners claim that it is secular and compare Pawtucket's sponsorship of the nativity scene to statutory Sunday closing laws. *See* Brief of the Petitioners at 10. The two could not be more different. While Sunday closing laws had their origins in religious purpose, then and now, these statutes regulated a secular activity — work. *See Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961). "The present purpose and effect of most of them [Sunday closing laws] is to provide a uniform day of rest for all citizens." *McGowan* v. *Maryland*, 366 U.S. 420, 445 (1961). The only religious aspect to closing law regulation is the indirect benefit to religion because the statutory day of rest coincides with the religious day of rest. This indirect benefit to religion of the Sunday closing laws was likened by this

Court, in *McGowan* v. *Maryland*, to the indirect benefit to religion occasioned by the statutory prohibition of murder which coincides with the same prohibition in the Ten Commandments. *Id.* at 442.

In contrast, the Pawtucket nativity scene does not have a secular purpose and, thus, provides more than an incidental benefit to religion. As found by the district court, the nativity scene solely has a religious function, *Donnelly* v. *Lynch*, 525 F. Supp. 1150 (1981), *see* this brief, *supra*, at 8-10, to recall the birth of the Christian Messiah, recognition of which is a basic tenet of Christianity. Thus, it is a symbol whose government sponsorship excludes religious groups which do not share the belief in that Messiah, such as the Jewish people. The isolation and divisiveness caused by city endorsement of this symbol is exactly what the establishment clause sought to prevent.

II.

City Sponsorship, Ownership and Maintenance of the Pawtucket Nativity Scene is Unconstitutional Under the Establishment Standard of the First Amendment: The City is by its Actions Advancing Religion, Preferring One Religion Over Others and Violating the Religious Neutrality Required of Government by the Establishment Clause

Pawtucket's sponsorship of a religious denominational symbol is not only advancing religion but a preference for the Christian religion. As a twofold establishment, the Pawtucket sponsorship of a nativity scene impermissibly contravenes constitutional standards governing discriminatory preference of religion, *see Larson* v. *Valente*, 456 U.S. 228 (1982) (striking Minnesota statute according tax exemptions to religious organizations preferentially) and constitutional standards limiting the government establishment of any religion. *See Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971).

In affirming the district court's holding of unconstitutionality, the court of appeals went beyond finding the nativity scene unconstitutional as an establishment of religion and found that, because

the nativity scene depicted the birth of the Christian Messiah and, thus, constituted an aid to the Christian religion, Pawtucket sponsorship of the nativity scene was a granting of a denominational preference to a specific religion — Christianity. "[T]he City's ownership and use of the nativity scene is an act which discriminates between Christian and non-Christian religions." *Donnelly* v. *Lynch*, 691 F.2d at 1034. Relying on Larson v. Valente, where this Court declared "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another," 456 U.S. at 244, the court of appeals held that under the establishment clause, the appropriate standard of review for government action affording a benefit which discriminates among religions was not the tripartite test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), used by the district court below, but rather the strict scrutiny test which is applied in fourteenth amendment discrimination review. *See Larson* v. *Valente*, 456 U.S. at 251.

Under this standard, the court of appeals found that the nativity scene did not survive the test of strict scrutiny which requires invalidation of discriminatory government preferences to religion unless the preference at issue "is justified by a compelling governmental interest" and "is closely fitted to further that interest." *Donnelly* v. *Lynch*, 691 F.2d at 1034, *citing approvingly Larson* v. *Valente*, 456 U.S. at 248. According to the court of appeals, the nativity scene unconstitutionally violated this test, because there was no finding below of any legitimate secular purpose for inclusion of the nativity scene in the government-sponsored display. Given that there was no legitimate secular purpose, the court of appeals held that *a fortiori* there was no compelling government interest in displaying the nativity scene. 691 F.2d at 1035, *citing* 525 F. Supp. at 1173. Further, the court of appeals' determination that the Pawtucket nativity scene constituted an establishment of religion which preferred the Christian religion over others incorporated the determination of the district court that the nativity scene constituted an establishment of religion. Under the tripartite test employed by the district court, applicable to

establishment of religions, *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), the evidence showed that the nativity scene unconstitutionally violated all three prongs. 525 F. Supp. at 1168-1181. The three-pronged test applied for over a decade by this Court to delineate the demarcation between church and state required by the first amendment's establishment clause provides:"[T]o pass muster under the Establishment Clause the law in question first must reflect a clearly secular legislative purpose. . . . second, must have a primary effect that neither advances nor inhibits religion. . . and, third, must avoid excessive government entanglement with religion. . . ."*Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 772-773 (1973) (citations omitted).

Pursuant to this three-element test, if even one of these criteria is not satisfied, the state law or practice must fall. *Stone* v. *Graham*, 449 U.S. 39 (1980) *(per curiam)*.

1. The Pawtucket Nativity Scene Does Not Reflect a Clearly Secular Purpose

In *Stone* v. *Graham*, 449 U.S. 39 (1980) (per curiam), this Court considered the purpose behind the posting of a copy of the Ten Commandments on the wall of public classrooms in Kentucky. Central to this Court's determination of invalid purpose was the religious nature of the Ten Commandments. The religiosity of the symbol posted on the wall, this Court found, overcame contrary statements of secular purpose. "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Stone* v. *Graham*, 449 U.S. at 41.

Similarly, as discussed at Point I of this brief, the Pawtucket nativity scene which depicts the birth, as recounted in the Gospels, of the Christian Messiah, Jesus, is so religious in nature that

the burden of showing a clearly secular purpose falls upon Pawtucket.[3] *See Stone* v. *Graham*, 449 U.S. at 41. Here, as found by the court below, Pawtucket failed to meet that burden.

On the basis of evidence before it, including testimony by the city of Pawtucket (J.A. 91-115), the district court found that the purpose of the city in displaying the nativity scene is to support the religious image which the symbol expresses — the celebration of the birth of the Christian Messiah.[4] *See Donnelly* v. *Lynch*, 525 F. Supp. at 1174. This conclusion of the nativity scene's religious purpose overcame, the court found, the city's allegations of contrary purpose. In particular, the city claims that the purpose of the nativity scene is not religious. Rather, the city alleges, the purpose is merely to use a "passive" display to "acknowledge" the "nativity theme in the holiday tradition." Brief of the Petitioners at 10.[5] Such "passive acknowledgement" by government of the nativity theme, the city claims, "is not an establishment of religion." Brief of the Petitioners at 21. According to the city,

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3. *Amici* do not claim that the nativity scene is so religious that it is per se unconstitutional. Indeed, both the district court and appellate decisions recognized that despite the religious symbolic nature of the nativity scene there could be situations where the nativity scene would not be unconstitutional. 525 F. Supp. at 1168, 1169, *cited in* 691 F.2d at 1035 n. 5, if the purpose for the display of the scene was clearly secular. Examples cited by the district court and affirmed by the court of appeals were the government use of a nativity scene as part of a museum display, 525 F. Supp. at 1169, or in an educational context, id. at 1177 n. 38, *cited approvingly in* 691 F.2d at 1035 n. 5.

4. The city argues that the religious purpose of the nativity scene is in some way mitigated by its context in this case. *See* Brief of Petitioners at 25. Even if one were to consider the nativity scene within the entire display, its purpose far from mitigated, rather is highlighted. The presence of the nativity scene, a religious symbol, as a part of a city-sponsored Christmas celebration demonstrates that the city is celebrating the religious reason for Christmas — that is the celebration of the birth of Jesus, the Christian Messiah, as the birth is recounted in the Gospels. As found by the court below, this religious context supports the religious meaning of the nativity scene. "[T]he City has placed the creche in a setting *supportive* of its meaning." 525 F. Supp. 1150, 1177 (emphasis in original).

5. Other ostensible purposes for the nativity scene, according to the city, are for community morale (J.A. 106) and to further cultural, traditional, aesthetic, economic and accessibility objectives (J.A. 109-110).

the establishment test provides that "if the context is secular and the accommodation to religion is passive, the test of neutrality has been met." Brief of Petitioners at 14.

By using terms like "passive display," "acknowledgement" and "accommodation," to describe their sponsorship of the nativity scene and citing to cases such as *McGowan* v. *Maryland*, 366 U.S. 420 (1961), and *Zorach* v. *Clauson*, 343 U.S. 306 (1952), the city attempts to cast this case as one involving free exercise issues. Brief of Petitioners at 14; *Amicus* Brief of the Solicitor General at 3. However, no free exercise is involved. No free exercise claim was made by Petitioners in their briefs below. Elimination of the city's sponsorship of the nativity scene would in no way violate the free exercise rights of those Pawtucket citizens who wish to celebrate Christmas. Indeed, the instant case could not be more different than the "accommodation" cases relied upon by Petitioners. For example, in *Zorach* v. *Clauson*, at issue was the question of whether New York public schools could constitutionally release students from school to attend religious classes held elsewhere. The purpose of the "released time" program in *Zorach* was clear — permitting students to leave the public schools to participate in religious events elsewhere was deemed an "accommodat[ion] [of] the public service to their spiritual needs." *Zorach* v. *Clauson*, 343 U.S. 306, 314. In so holding this Court was quick to distinguish what was not permissible:

> Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person.

343 U.S. at 314.

Pawtucket's use of public funds to sponsor the nativity scene display for teaching the story of the birth of the Christian Messiah falls into this impermissible category recognized by the *Zorach* Court. Thus, this type of sponsorship of a religious activity may be compared for analytic purposes not to *Zorach*, where government only permitted students to leave the schools for religious reasons, but rather to *McCollum* v. *Board of Education*, 333

U.S. 203 (1948), where the state did not merely seek to release students for religious study but rather sought to allow religious instructors to come on to the public school campus to teach. In light of the active government sponsorship found in *McCollum* and absent in *Zorach*, this Court found that the active government sponsorship in *McCollum* violated the first amendment's establishment clause.

In *McCollum*, this Court found that the government stepped beyond the accommodation of religious beliefs provided for in the *Zorach* "released time" program to active sponsorship of these beliefs. Similarly, in the instant case Pawtucket has gone beyond the mere accommodation of celebration of Christmas beliefs to active sponsorship of that celebration. Mere accommodation of Christmas occurs when citizens have time off so as to permit them to celebrate the holiday. Thus, the United States government has made Christmas a national holiday to accommodate the religious needs of the majority of its citizenry. 5 U.S.C. § 6103. As in *Zorach*, this time off from work, like the time off from school, allows persons to engage in religious activities. However, that is all it does. The existence of the national holiday does not cross the parameters of accommodation set forth in *Zorach*. In contrast, the Pawtucket celebration, by sponsoring the nativity scene depicting the birth of Jesus, like the school in *McCollum*, aids religion in the dissemination of doctrine in violation of the establishment clause. As declared by this Court in *McCollum*, to hold that a state may not:

> aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not... manifest a governmental hostility to religion or religious teachings.... For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.

333 U.S. at 211-212.

The intermingling of these respective spheres was found by the district court below. The court listened to all of the testimony

before it, rejected the putative secular purposes before it advanced by Petitioners and determined that the purpose of the city of Pawtucket in sponsoring this nativity scene was religious and, therefore, unconstitutional. The court of appeals upheld this finding. There is no basis for disturbing that determination by this Court.

2. *The Primary Effect of the Pawtucket Nativity Scene is to Advance Religion*

In addition to the Pawtucket nativity scene's religious purpose, its direct and immediate effect is to advance religion. This violates the second element of the establishment clause test. *See Committee for Public Education* v. *Nyquist*, 413 U.S. at 773. The effect inquiry examines whether the state has placed its imprimatur upon religious activity. *See Abington* v. *Schempp*, 374 U.S. at 216-219.

Traditionally this Court's scrutiny of the government's role with respect to religious activity has been very strict. Even where the effect consists merely of a "symbolic benefit" to religion in the minds of the public, this Court has held that this suffices to invalidate the statute under the establishment clause. *See Larkin* v. *Grendel's Den*,__U.S.__, 51 U.S.L.W. 4025 (Dec. 13, 1982), where this Court held unconstitutional a statute giving governing bodies of schools and churches the power to prevent issuance of liquor licenses within a 500-foot radius of their church or school. This Court explained that "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." 51 U.S.L.W. at 4028.[6]

6. Furthermore, government action may be unconstitutional even if its religious effect is not the primary effect. In *Committee for Public Education* v. *Nyquist*, this Court held that government programs with direct religious effects were unconstitutional, regardless of whether such effects were less substantial than the secular effects of the programs. Even the "mere possibility" of an effect which advances religion is constitutionally impermissible. 413 U.S. at 783 n. 39, *citing Tilton* v. *Richardson*, 403 U.S. 672, 683 (1971) (plurality decisision that the

Here, the district court, as affirmed by the court of appeals, 629 F.2d at 1035, found that the Pawtucket nativity scene had the unconstitutional effect of advancing religion. 525 F. Supp. at 1178. Moreover, in recognition of the twofold establishment problem inherent in the Pawtucket nativity scene, the court found that the effect of the nativity scene was to advance a particular religion — Christianity.

> [T]he creche conveys more than a remote and incidental benefit on Christianity. By using a religious symbol in a seasonal celebration of a holiday having religious significance for some groups, the City has given those groups special status. It has singled out their religious beliefs as worthy of particular attention, thereby implying that these beliefs are true or especially desirable. . . . Moreover, Pawtucket's use of the creche encourages in its citizens the belief that the Christian majority has the right to have "its" government reflect and express the religious beliefs that the majority regards as important.

525 F. Supp. at 1178.

This double effect recognized by the district court is, for *amici*, the crux of the problem with the Pawtucket nativity scene. For minority religious groups, the effect of seeing government sponsorship of a particular religious symbol which is essentially a teaching aid for the story of the birth of that religion's savior, *see* this brief, *supra*, at 8-10, is inestimable. The message sent out to the community is that there is a coincidence of government with certain religious beliefs, to the exclusion of those citizens who do not share those beliefs.

> When a city so openly promotes the religious meaning of one religion's holidays, the benefit reaped by that religion and the disadvantage suffered by other religions is obvious. Those persons who do not share those holidays are

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mere possibility of a federally financed structure being used for religious purposes 20 years hence was constitutionally unacceptable because the grant might "in part have the effect of advancing religion").

> relegated to the status of outsiders by their own government; those persons who do observe those holidays can take pleasure in seeing the symbol of their belief given official sanction and special status. . . .

Fox v. *City of Los Angeles*, 22 Cal. 3d 792, ____, 587 P.2d 663, 670 (1978) (Supreme Court of California striking as unconstitutional defendant city's illuminated cross on its City Hall).

In addition to this twofold effect of advancing a particular religion, the instant nativity scene has a heightened effect with respect to children. The nativity scene's location in a Christmas display, which is largely designed to attract children through wishing wells, Walt Disney characters and Santa Claus giving out free candy, draws to the nativity scene, which is a religious symbol, an audience which is particularly vulnerable to religious influences — school children. This special vulnerability of school children has been recognized by this Court in a long line of decisions, *see, e.g., Abington* v. *Schempp*, 374 U.S. at 212-213; *Engel* v. *Vitale*, 370 U.S. 421, 434 (1962); *Zorach* v. *Clauson*, 343 U.S. 306, 312-313 (1952).

Given the recognized vulnerability of children to religious influences, this Court has accorded to children heightened protection from such influences. *See Marsh* v. *Chambers*, ____ U.S. ____, 51 U.S.L.W. 5162, ____, slip op. at 8-9 (July 5, 1983) (adults unlike children not readily susceptible to religious indoctrination or peer pressure); *Widmar* v. *Vincent*, 454 U.S. 263, 274 n. 14 (1983). In the instant case, pursuant to the heightened scrutiny required when school children are the audience, this Court must invalidate the nativity scene because of its effect of advancing religion. As testified to below, the impression upon a child of a religious symbol in the midst of the city-sponsored display could be substantial:

> For a child to be involved with the Pawtucket display, the lights, Santa, everything that is just absolutely seductive to the interests of a child the child will notice every part of it and will remember it for a long time. . . .

(J.A. 80).

The consequences of this impression are damaging chiefly to the child of a minority religious group. It is this child that will encounter a conflict between the attractions of the display and the religious message inherent in the nativity scene. Such a display thus places the burden upon the parents of the minority child to explain the religious symbol and to attempt to disassociate the imprimatur of the city government from the religious symbol (J.A. 83). This effect of the Pawtucket nativity scene underscores the unconstitutionality of government sponsorship of religious displays.

3. *The Pawtucket Nativity Scene Excessively Entangles the State With Religion*

To pass establishment clause muster, a statute must not only satisfy the requirements of secular purpose and effect, but must also avoid the creation of excessive government entanglement with religion. *Nyquist*, 413 U.S. at 773; *Lemon* v. *Kurtzman*, 403 U.S. at 612-613; *Walz* v. *Tax Commission*, 397 U.S. 664, 674 (1970).

While Pawtucket's nativity scene does not involve "administrative" entanglement between government and religious organizations, *see Donnelly* v. *Lynch*, 525 F. Supp. at 1179, the district court found that entanglement between government and religion is engendered by the nativity scene, from the divisiveness in the community generated by competing efforts to gain the support of government. *Donnelly* v. *Lynch*, 525 F. Supp. at 1179, *citing Committee for Public Education* v. *Nyquist*, 413 U.S. at 796, *quoting Everson* v. *Board of Education*, 330 U.S. 1, 8-9 (1947). This "political fragmentation and divisiveness" was one of the principal evils against which the first amendment was intended to protect. *See Lemon* v. *Kurtzman*, 403 U.S. at 624. *Cf. Mueller* v. *Allen*, ___U.S.___, 51 U.S.L.W. 5050, 5054 n. 11 (June 29, 1983) (political divisiveness inquiry is confined to cases where there is direct financial sponsorship by government). Here, evidence of

fragmentation and divisiveness as a result of the Pawtucket nativity scene's religious nature is abundant. The district court found that "the atmosphere has been a horrifying one of anger, hostility, name calling and political maneuvering. . . ." 525 F. Supp. at 1180.

Beyond the divisiveness in the Pawtucket community, there is evidence that nationwide, the expression by government of sectarian symbolism carries with it an inevitable potential for divisiveness. This divisiveness is revealed by the sheer number of cases across the country questioning the government-sponsored nativity scene.[7]

In one community, Scarsdale, a suburb of New York, a village nativity scene has been the center of conflict for 23 years. "Voices of dissent emerged as early as 1960 when . . . the Jewish community was distressed by religious displays on public property and the injection of religious matter in public affairs.... Over time, however, the creche generated more and more controversy in the community." Plaintiffs' Pre-trial Memorandum at 8, *McCreary* v. *Stone*, No. 83-0987 (S.D.N.Y. 1983) (awaiting decision).

This divisive effect upon the Scarsdale community together with the similar effect found by the district court in Pawtucket illustrate the inevitable dangers inherent in the government sponsorship of sectarian symbols. Because such sponsorship constitutes a twofold establishment, preferring one religion or another, it automatically pits different religious groups against each other. While the apparent losers are the minority religious groups (of

7. To date these include: *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973); *McCreary* v. *Stone*, No. 83-0987 (S.D.N.Y. filed Feb. 7, 1983); *Ahlburn* v. *Cianci*, No. 82-801 (D.R.I. filed Dec. 17, 1982); *Citizens Concerned for Separation of Church and State* v. *Denver*, 508 F. Supp. 823 (D. Colo. 1981); *Citizens Concerned for Separation of Church and State* v. *Denver*, 481 F. Supp. 522 (D. Colo. 1979), *appeal dismissed*, 628 F.2d 1289 (10th Cir. 1980), *appeal docketed*, No. 82-1022 (10th Cir. 1982); *Russell* v. *Town of Mamaroneck*, 440 F. Supp. 607 (S.D.N.Y. 1977); *Conrad* v. *Denver*, —Colo.—, 656 P.2d 662 (Sup. Ct. Colo. 1983) *(en banc)*; *Lawrence* v. *Buchmueller* 40 Misc. 2d 300, 243 N.Y.S.2d 87 (Sup Ct. 1963); *Baer* v. *Kolmorgen*, 14 Misc. 2d 1015, 181 N.Y.S.2d 230 (Sup. Ct. 1958).

obvious concern to *amici*) who do not have the numbers to impose their religious symbols on the community, the clear message of the Founding Fathers in the establishment clause is that the whole community loses when government and religion are intertwined. "[A] union of government and religion tends to destroy government and to degrade religion." *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962).

To avoid this spectre, this Court must now affirm that the Pawtucket city government sponsorship of the nativity scene is unacceptable entanglement under the establishment clause. Such an affirmance would eliminate only one thing — government sponsorship of the Pawtucket nativity scene. Yet without the prospect of government endorsement, there will be no divisiveness as a result of the nativity scene display. There will be no competition among groups vying for government endorsement. Thus, such an affirmance simplifies the future. The struggle among religious groups for imprimatur places a burden not only upon the executive branch of the government but also upon the courts. For the task of deciding among all the various religious symbols falls upon the courts. Ultimately this Court is the arbiter of which symbols can be displayed in cities and states throughout this country.

In deciding now that this type of decision-making is unacceptable entanglement, this affirmance would send to the American people a clear message that it is the sponsorship by the city that rendered the Pawtucket nativity scene unconstitutional. And from the announcement of that holding, the citizens of Pawtucket and throughout the United States would know that the nativity scenes they see are not government sponsored and, thus, not government endorsed. In this way, a holding affirming the decisions below would address all present and potential nativity scene establishments.

CONCLUSION

For the reasons set forth above, the Anti-Defamation League of the B'nai B'rith and the American Jewish Congress, as *amici curiae* urge affirmance of the judgment of the court of appeals below.

Respectfully submitted,

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